Supreme Court of the United States

October Term, 1971

No. 71-16

JOHN M. MITCHELL, Attorney General of the United States, WILLIAM P. ROGERS, Secretary of State,

Appellants,

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIEF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY, and RICHARD A. FALK,

Appellees.

On Appeal from the United States District Court for the Eastern District of New York

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the three-judge District Court be affirmed on the ground that it is so firmly supported by prior decisions of this Court regarding the freedom of American citizens to engage in public and academic debate and inquiry that no substantial question remains or has been presented by appellants to warrant further argument in this Court.

STATEMENT OF THE CASE

Preliminary Statement

The political exclusion provisions of the McCarran Act,[1] authorize the Attorney General and Secretary of State to screen the admission of a class of aliens indentified only by their political and economic beliefs. The process is initiated under Section 212(a)(28)(D) and (G)(v) by the Secretary of State, who is required to disqualify an alien from receiving a nonimmigrant visa, without which he cannot enter the United States, if it is found that the alien has at any time advocated or taught the "economic, international, and governmental doctrines of world communism," or written, published, circulated, distributed or displayed literature advocating or teaching such doctrines. Section 212(d)(3)(A) authorizes the Attorney General, acting upon a favorable recommendation from the Department of State, to waive the political ineligibility of any alien in this class or to deny such waiver and exclude the alien.[2]

In this case, numerous American scholars and students have extended invitations to Dr. Ernest Mandel, a citizen and resident of Belgium, seeking his participation in academic meetings at various universities and other public forums in the United States. But since 1969, the Attorney General has consistently refused to waive Dr. Mandel's political ineligibility for a nonimmigrant visa and consequently he has been unable to fulfill these engagements.

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1. This reference is limited to Sections 212(a)(28)(D) and (G)(v), 212(d)(3)(A) of the Immigration and Nationality Act of 1952, 8 U.S.C. §§1182(a)(28)(D) and (G)(v), 1182(d)(3)(A).

2. The various classes of nonimmigrant aliens are described by 8 U.S.C. §§1101(a)(15) in terms of the purpose for which the alien seeks entry into this country. General requirements for obtaining a nonimmigrant visa are set forth in 8 U.S.C. §§1201 and 1202. Procedures governing the making and submission of applications for nonimmigrant visas and for waivers of ineligibility have been promulgated by the Secretary of State and are set forth in 8 C.F.R. §§ 212.1, .4; 214.1.

That refusal is not based on any claim that Dr. Mandel has subversive affiliations, that his presence in this country endangers national security, that his exclusion is dictated by actual foreign policy considerations, or, indeed, that any valid Government interest is involved. In fact, no independent reason appears in the record or has been asserted by the Attorney General as the basis for his actions. Rather the Attorney General states that he merely exercised his statutory, if not inherent, "discretion" to deny a waiver of ineligibility and thereby consign Dr. Mandel to the class of aliens excludable solely because of their disfavored political philosophy, under § 212(a)(28)(D) and (G)(v).

This suit was brought by a group of American scholars, who had invited Dr. Mandel here for academic discussions and who assert a First Amendment right to do so. This right was sustained by the court below explicitly on the finding that appellants had failed to demonstrate any specific valid governmental interest that is furthered by preventing citizens from meeting with Dr. Mandel in this country. The court concluded that the effect, if not the purpose, of excluding Dr. Mandel without any legitimate reason, was to apply the political exclusion provisions of the McCarran Act as a system for censoring information and ideas that citizens have a right to receive.

On this appeal, appellants do not deny that they are constitutionally forbidden to exercise their exclusion power as a means of censoring freedom of citizens to engage in academic and political discussion. But appellants contend that even where, as here, citizens are arbitrarily denied that freedom, there is no remedy in court. Dr. Mandel's exclusion, whatever its basis and despite its impact on First Amendment rights, according to appellants, is an exercise of the sovereign power to conduct foreign relations and maintain national security, and therefore beyond the scope of judicial inquiry.

On the basis of the factual record, which appellants concede is not in dispute, and after careful consideration of the decisions of this Court and the basic historical data relating to

the purposes underlying the First Amendment, the court below rejected appellants' claim of absolute power. This appeal raises only one question: whether the federal courts are powerless to review and redress a deprivation of the First Amendment rights of American citizens to engage in discussions with an alien scholar at academic meetings in this country, where such meetings have been prevented by virtue of appellants' decision to exclude the alien for no other reason than the undesireability of his intellectual philosophies.

The Facts

This case was commenced by persons, who, except for Dr. Mandel, are all citizens and residents of the United States. Each of these citizens is a member of the faculty at a major American university and is engaged in scholarly work in one or several fields of the social sciences. Each has attained prominence in the academic community, in some instances as Chairman of his department; some have achieved world-wide recognition for their academic endeavors.

For many years these appellees and many other American scholars and students have sought Dr. Mandel's participation in lectures, debates, seminars and similar academic programs at their universities and at other public forums in this country. Their interest in Dr. Mandel stems from the fact that he is an internationally known scholar, economist and journalist, and a noted authority on and exponent of Marxist economic theory. His two volume text entitled *Marxist Economic Theory*, published in 1969, has been acclaimed the major, contemporary work in its field.

In 1968, Dr. Mandel received a number of specific invitations from members of the American academic community. He accepted many of these and during a period which extended from early September to November, 1968, he fulfilled speaking and debating engagements at more than 30 universities in the United States and Canada, including Harvard, Swarthmore, Antioch, Michigan, Notre Dame and Berkley.

Similar invitations were received in 1969; one, from Stanford University, which Dr. Mandel accepted, sought his participation in a two-day conference, October 17, and 18, 1969, on "Technology and the Third World" as a speaker and as a panalist to discuss a speech to be given by Professor John Kenneth Galbraith of Harvard.

On September 8, 1969, Dr. Mandel applied to the American Consulate in Brussels for a nonimmigrant, temporary visa, as he had done in connection with his speaking tour the previous year. The application sought permission to enter and remain in the United States for six days from October 14 through October 20 for the sole purpose of attending the Stanford Conference.[3]

Appellants denied the visa application without prior notice to Dr. Mandel or anyone concerned with the Stanford Conference. In fact, no word of appellants' action was conveyed to anyone until five days after the conference and purpose of the visit had ended, at which time Dr. Mandel was orally advised by the American Consulate in Brussels of the denial.

The advice was confirmed in the Consul's letter of October 30, 1969 to Dr. Mandel.[4] The Consul explained that Dr. Mandel had been found ineligible, in 1962, to receive a nonimmigrant visa under the political exclusion provisions of the McCarran Act.[5] According to the Consul, Dr. Mandel's admissions to the United States in 1962, as a working journalist, and in 1968, for his speaking tour, were based on waivers of ineligibility granted by the Attorney General upon favorable recommendations from

3. The six-day request was made so that Dr. Mandel would have the personal convenience of two days' travel time before and after the conference.

4. Exhibit H to the affidavit of Leonard B. Boudin submitted in support of the motion for a preliminary injunction.

5. Annexed to the letter was a three page copy of §§212(a)(28) and 212(d)(3)(A) of the McCarran Act. But the Consul did not specify under which provision the ineligibility finding was made. Nor did the Consul indicate that this finding had ever been the subject of review since 1962.

the Department of State. The Consul specifically acknowledged, however, that Dr. Mandel had not been "clearly informed, in 1962, of the refusal and subsequent discretionary procedure being followed," but closed by stating without futher explanation that the Department of State had refused to recommend the granting of a waiver in connection with his recent application.

On October 22, 1969, prior to having been advised as to the disposition of his September application, Dr. Mandel submitted a new application. This application sought admission to the United States for the period from early November to December, 1969, specifically for the purpose of fulfilling invitations to speak and lecture at (i) several universities, including Princeton, Amherst, The New School, Columbia and Vassar, (ii) at a student sponsored conference at the Massachusetts Institute of Technology, and (iii) at a conference arranged jointly by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference at Town Hall in New York City.

The summary denial of the September application triggered concern among the appellees and other citizens, who had invited or had intended to take part in discussions with Dr. Mandel, that the October application would receive similar treatment. Appellees' attorney, among others, sought an explanation from the Department of State for the denial of the September application and an assurance that the October application would be granted.

In response, the Administrator of the Bureau of Security and Consular Affairs advised appellees' attorney on November 6, 1969 that the Department of State's decision not to recommend waiver of ineligibility was premised on its belief that in 1968 Dr. Mandel had violated the conditions attached to the waiver he had been granted by "engag[ing] in activities beyond the stated purposes of his trip."[6] But, as the Administrator

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6. Exhibit J to the affidavit of Leonard B. Boudin submitted in support of the motion for preliminary injunction.

stated, after further review it was the Department's conclusion "that in 1962 and 1968 Dr. Mandel was apparently not informed that a visa was issued only after obtaining a waiver of ineligibility and therefore may not have been aware of the conditions and limitations attached to the visa issuance. In view of this and his assurances, given in connection with his current [October] application, that he will conform to his stated itinerary and purposes, we are reconsidering his case and are discussing it with the Department of Justice."

Despite repeated requests during November and December, 1969, for further information on the status of Dr. Mandel's visa application, no word was received until January 27, 1970, when the Bertrand Russell Foundation was advised by the Department of State that ". . . in the interest of free expression of opinion and exchange of ideas we recommended a waiver for Dr. Mandel. The Immigration and Naturalization Service (acting for the Attorney General) responded that a waiver was not warranted."[7]

In reply to similar requests, a representative of the Immigration and Naturalization Service (INS) advised appellees' attorney on February 13, 1970, that since 1962 Dr. Mandel has been deemed ineligible for a visa "because of his subversive affiliations" and that based on his activities during his entry in 1968, which "went far beyond the stated purposes of his trip . . . and represented a flagrant abuse of the opportunities afforded him to express his views in this country . . . it was concluded that the favorable exercise of discretionary authority provided under the Immigration and Nationality Act was not warranted."[8] Without referring to the findings of the Department of State, which contradicted those underlying the deter-

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7. Exhibit M to the affidavit of Leonard B. Boudin submitted in support of a motion for a preliminary injunction.

8. Exhibit P to the affidavit of Leonard B. Boudin submitted in support of a motion for a preliminary injunction.

mination of the INS, the letter closed with the statement that "[t]here was no basis for changing this determination."[9]

By their complaint filed on March 19, 1970, appellees sought to enjoin further enforcement against Dr. Mandel of the political exclusion provisions, principally on the grounds that the application of those provisions in this case violated the First Amendment right of the American appellees to hear Dr. Mandel and to engage in free and open academic debate and inquiry with him.[10]

Appellants' position can best be described by first stating what their position was and is not. Appellants recognize the fact that the invitations which have been sent to Dr. Mandel by appellees and other American scholars and students were made in good faith and sought his participation in genuine academic programs. It is also recognized that Dr. Mandel is qualified in all

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9. The INS letter did not explain why two prior letters requesting information sent by appellees' attorney had not been answered or why no response was received until so long after the period of Dr. Mandel's proposed visit had ended. Nor was there any explanation in the INS letter for the fact that the determination to refuse to waive ineligibility was not made by the Attorney General as §1182(d)(3)(A) requires, but by an employee of the INS "acting for the Attorney General." See *supra*, p. 2.

10. In addition to challenging on First and Fifth Amendment grounds, the validity of the political exclusion provisions on their face and as applied, appellees also sought to restrain their enforcement against Dr. Mandel, because (i) the terminology of §212(a)(28)(D) and (G)(v) was so vague and overbroad and the discretionary power delegated to the Attorney General by §212(d)(3)(A), so unlimited, that these provisions invested appellants with unfettered power to prevent Americans from hearing any expression of political, social, economic or other intellectual opinion which has not obtained Government approval; (ii) the provisions operate to bar expression of opinions relating only to one side of the spectrum of political philosophies; (iii) the provisions fail to provide adequate, or indeed, any procedural safeguards and ascertainable standards; and (iv) there is not a scintilla of evidence to support the findings underlying the Attorney General's refusal to accept the Secretary of State's favorable waiver recommendation.

respects for a nonimmigrant visa, and is deemed ineligible to receive such a visa solely by virtue of the political exclusion provisions of the McCarran Act.

Appellants also concede, contrary to the assertion in the February 13, 1970 INS letter, that Dr. Mandel's ineligibility is not based on a claim that he is a member of the Communist Party or its affiliates, nor indeed, on any claim of "subversive affiliations." Dr. Mandel's ineligibility is based instead solely and explicitly on his writings (or more accurately the title of his book, *Marxist Economic Theory)* and the fact that he is the editor of "the Belgian Left Socialist Weekly," and therefore, appellants contend, he falls within the class of aliens delineated by § 212(a)(28)(D) and (G)(v). (Juris. State. p. 4.)[11]

Furthermore, appellants eschew here, as in the court below, any reliance on Dr. Mandel's alleged violation of the conditions placed on his visa in 1968. In their affidavit opposing the convening of a three-judge court, appellants asserted that the question of whether or not such a violation had occurred is "irrelevant" and therefore produced no evidence on this point. Nor, for that matter, do appellants claim that Dr. Mandel was excluded as a form of diplomatic reprisal against Belgium or because of strained relations with that country or because Belgium has arbitrarily excluded Americans or because Dr. Mandel's presence in this country would endanger national security Aside from the mere assertion that Dr. Mandel was excluded in the exercise of appellants' powers over foreign affairs and national security, no specific interest relating to these powers has been identified by appellants as the reason for the action they have taken.

In short, as the court below found, appellants' position is simply that with respect to aliens who fall within the class

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11. "Juris. State." refers to the Jurisdictional Statement filed by the Solicitor General on behalf of appellants; "a" refers to the appendix to the Jurisdictional Statement.

delineated by Section 212(a)(28)(D) and (G)(v) "the Attorney General is not required to have factual support for or to justify his discretionary decision not to grant temporary admission since the power to exclude is absolute and waiver of exclusion purely a matter of grace." (8a)

The majority below rejected the existence of such absolute and unfettered power where its exercise entrenched upon First Amendment rights. "[T]he First Amendment peremptorily forbids equating the implied power to exclude aliens in the interest of national security and the even conduct of international affairs with a power to abridge the freedom of speech, press and peaceable assembly." (26a). Even if the political exclusion provisions of the McCarran Act were genuinely enacted for the purpose of protecting national security, the court concluded that the reach of these provisions was so indiscriminate that they can be employed, as in this case, "as a means of restraining the entry of disfavored political doctrine." (11a). As the court further stated:

> "The prevention of the teaching and advocacy that is not incitement or conspiracy to initiate presently programmed violence is not in any degree a legitimate legislative objective . . . It is forbidden in ultimate analysis, because the public interest—expressed in the First Amendment—requires that the citizens as sovereign have access to, evaluate and accept or reject that teaching as well as every other teaching or advocacy." (24a)

Finding that appellants had not even suggested that Dr. Mandel's exclusion served any legitimate government interest, whether in the realm of national security, foreign relations or otherwise, the court declared that "[t]he challenged parts of the Act as here applied . . . do not reflect a genuine exercise of the implied power of alien exclusion." (26a)

Having determined that the political exclusion provisions, as applied, violated the First Amendment, the court entered a

judgment, from which this appeal arises, enjoining appellants from "implementing and enforcing §§212(a)(28) and 212(d)(3)(A) . . . so as to deny plaintiff Mandel admission to the United States as a nonimmigrant visitor." (60a)

Although District Judge Bartels, in dissent, argues that the political exclusion provisions are valid because they can be invoked to serve "important objectives of (1) national security and (2) foreign policy" (36a) he, like appellants, does not contend that any of these interests were in fact served by preventing American citizens from meeting with Dr. Mandel for academic discussions in this country.

ARGUMENT

The decision below is dictated by the rulings of this Court.

The freedom of American citizens to receive information and ideas is "fundamental to our free society"[12] and its protection is "nowhere more vital" than in the present context of academic inquiry and debate.[13] The decision below rests on the basic premise of our constitutional form of government, that the First Amendment is not a grant of rights to citizens, but rather an affirmation of "the total retention by the people as sovereign to themselves of the right to free and open debate of political questions. . ." (22a). As the court further stated:

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12. *Stanley v. Georgia*, 394 U.S. 557, 564; see also *New York Times Co. v. United States*, ____ U.S. ____, 39 U.S. Law Week 4879; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390; *Griswold v. Connecticut*, 381 U.S. 479, 482; *Lamont v. Postmaster General*, 381 U.S. 301, 307-308 (Mr. Justice Brennan concurring); *Martin v. City of Struthers*, 319 U.S. 141, 143.

13. *Shelton v. Tucker*, 364 U.S. 479, 487; see also *Keyishian v. Board of Regents*, 385 U.S. 589, 603; *Baggett v. Bullitt*, 377 U.S. 360; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 and at 262 (Mr. Justice Frankfurter concurring).

In numerous recent decisions, the right to hear has prevailed over university "speaker bans", which, like the McCarran Act provisions involved in this case, were employed to keep "alien" political philosophies.

> "The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to have him explain and seek to defend his views; that as *Garrison* and *Red Lion* observe, is the essence of self-government." (22a-23a).

In this case the admission of Dr. Mandel is but a "lever" by which the First Amendment rights of American citizens can be given effect. (25a). While several provisions of the Constitution place this lever in appellants' hands, another provision, namely the First Amendment, clearly controls its use, as it does every other general executive and legislative power, to prevent the needless or intentional destruction of fundamental rights.[14]

Exclusion "for any reason," as appellants have said, forecloses the opportunity for any person to engage in discussions with aliens in this country. (Juris. State., p. 9) But, as appellants concede, they may not constitutionally exclude aliens for that reason or for that effect.[15] Yet, this is precisely what has

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out of college classrooms and lecture halls. See *Molpus v. Fortune*, 432 F.2d 916 (5th Cir. 1970); *Pickings v. Bruce*, 430 F.2d 595, 598-599 (6th Cir. 1970); *Brooks v. Auburn University*, 412 F.2d 1171, 1172 (5th Cir. 1969); *ACLU v. Radford*, 315 F.Supp. 893 (E.D.Va. 1970); *Smith v. University of Tennessee*, 300 F.Supp. 777 (E.D.Tenn. 1969); *Snyder v. Board of Trustees*, 286 F.Supp. 927 (N.D.Ill. 1968).

14. This Court has enforced the First and Fifth Amendments in cases involving the assertion of government powers of the broadest dimensions, including the war power, see *United States v. O'Brien*, 391 U.S. 367; *United States v. Robel*, 389 U.S. 258; the power to maintain national security, *United States v. Robel, supra; Aptheker v. Secretary of State*, 378 U.S. 500, 508-509; the power to conduct foreign relations, *New York Times Co. v. United States, supra; Kent v. Dulles*, 357 U.S. 116, 125-130; see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-165; *O'Callahan v. Parker*, 395 U.S. 258, 273; *Youngstown Co. v. Sawyer*, 343 U.S. 579, 587.

15. See *Brandenburg v. Ohio*, 395 U.S. 444, 448-449; *Lamont v. Postmaster General, supra; Kent v. Dulles*, 357 U.S.116; *Speiser v. Randall*, 357 U.S. 513, 527.

occurred here. Absent any claim of countervailing interest, Dr. Mandel's exclusion has the sole and selective effect, if not intended result, of preventing citizens from discussing ideas of which the Government does not approve.[16]

Moreover, the citizens appellees in this case do not assert the general public interest in hearing the views of aliens, but rather their own specific interest in the admission of Dr. Mandel. As the court below stated:

> "Here the plaintiffs other than Mandel are directly involved with Mandel's entry because they have invited him, and they expect to participate in meetings with him, or expect to be among his auditors. No more is required to establish their standing. *Cf. Snyder v. Board of Trustees, supra*, 286 F. Supp. at 931-932; *Smith v. University of Tennessee*, E. D. Tenn. 1969, 300 F.

In this case issuance of a visa to Dr. Mandel is closely analogous to issuance of a license to speak in a public park. While the exercise of First Amendment rights depends on obtaining a government permit or license, it is firmly settled under decades of rulings by this Court, that the permit or license can not be withheld without legitimate reason and certainly not because the ideas sought to be expressed do not meet with Government approval. See *Cohen v. California*, ___ U.S. ___, 91 S. Ct. 1780, 1786; *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151; see also *Teague v. Regional Commissioner of Customs*, 404 F.2d 441, 445 (2d Cir. 1968), *cert. denied* 394 U.S. 977.

16. By contrast in both *United States v. O'Brien, supra* at 381-382 and *Zemel v. Rusk*, 381 U.S. 1, 13 the Court sustained the applications of the challenged statutes involved, expressly because they were neither predicated on nor directed towards the control of speech, beliefs or associations protected by the First Amendment. See also *Teague v. Regional Commissioner of Customs, supra* at 445-446 (where minor restraints on the inflow of literature from Communist China were found not to violate the First Amendment since, in contrast to the application of the political exclusion provisions here, the Customs regulation in *Teaque* involved "no inquiry into the content of the detained material," was not implemented to restrict "the flow of information or ideas" and was narrowly limited to achieving a "proper, important, and substantial" government objective). Here as in *Lamont v. Postmaster General, supra*; and *Speiser v. Randall, supra*, the thrust of the Government's action is aimed at curtailing the expression of ideas citizens have a right to hear.

> Supp. 777, 780. The special relation of plaintiffs to Mandel's projected visit gives them a specificity of interest in his admission, reinforced by the general public interest in the prevention of any stifling of political utterance, that abundantly satisfies 'standing' requirements." (23a).[17]

Appellants make a hollow attempt to minimize the effect of Dr. Mandel's exclusion. They suggest that interested citizens can read Dr. Mandel's books, and if they have anything to discuss with him, they can meet him outside the country. But, what citizens have lost by virtue of appellants' actions is the openness, spontaneity and responsiveness of face to face confrontations, which is the essence of academic debate.[18] Just as this Court has found written submissions generally to be no substitute for oral argument, *Goldberg v. Kelly*, 397 U.S. 254, 289, so, too, the availability of Dr. Mandel's books in this country cannot replace his presence in a classroom or conference. The suggestion that Dr. Mandel's American audience can meet him outside the country is so obviously impractical as to require no further discussion, and is also quite improper since "no one is to have the exercise of his liberty of expression abridged in appropriate places on the plea that it may be exercised in some other place." *Thornhill v. Alabama*, 310 U.S. 88, 106.

Equally untenable is appellants' basic position that they have absolute power to exclude any alien, without cause or justification and regardless of the impact on First Amendment

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17. Cf. *Investment Co. Institute v. Camp*, 401 U.S. 617; *Data Processing Service v. Camp*, 397 U.S. 150; *Barlow v. Collins*, 397 U.S. 159.

18. This Court has recognized that personal contacts with foreign scholars is invaluable to the growth and progress of American scholarship. *Kent v. Dulles, supra* at 126-127; see also *Sweezy v. New Hampshire, supra* at 250; Hearings Before the President's Commission on Immigration and Naturalization, 82nd Cong., 2d Sess. 408, 1464; Comment, 6 Harv. Civ. Rts. Civ. Lib. L. Rev. 141, 143-150 (1970); Heisenberg, *Physics and Beyond, Encounters and Conversations* (1971) (*passim*).

rights of citizens. Appellants argue that in spite of the fact that Dr. Mandel's exclusion serves no legitimate foreign or domestic interest and chokes off debate in which citizens have a right to engage, any application of the exclusion power is an exercise of sovereignty and hence unreviewable.

That argument was rejected by the court below on the basis of consistent rulings by this Court, which have resisted every attempt by Government officials to carve out spheres of operations that are exempt from judicial scrutiny and First Amendment limitations. This Court has made it perfectly clear that the First Amendment categorically forbids the exercise of any government power as a means of censoring what citizens are entitled to hear and debate, particularly in academic settings.

Both the unqualified terms and underlying purposes of the First Amendment bar any inference that there exists a special exception for the exclusion power. Nor does any decision of this Court recognize or imply that either the executive or legislative branches are endowed with supra-constitutional powers, sovereign or otherwise, by which they may override the powers delegated to the judicial branch or the rights reserved to the people.[19] Indeed, the decisions of this Court, rendered over

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19. Appellants' reliance on cases in which the exclusion power has been referred to as "inherent in sovereignty" (Juris. State., p. 9) does not avail their claim of absolute, unreviewable power. None of those cases involved a claim of First Amendment right by citizens, or by aliens who had standing to assert such rights.

In addition, it is significant that appellants' absolutist position has been rejected in alien expulsion cases, despite the fact that the powers to exclude and expel "rest upon one foundation, and are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." *Fong Yue Ting v. United States*, 149 U.S. 698, 713. This Court has clearly held that aliens in this country enjoy the protections of the First Amendment. See *Harisiades v. Shaughnessy*, 342 U.S. 580; *Bridges v. Wixon*, 326 U.S. 135, 148; see also *Massignani v. INS*, 438 F.2d 1276, 1278 (7th Cir. 1971).

Moreover, this Court's references to the exclusion power as an element of sovereignty were made solely in the context of demonstrating that the

a period of several decades and involving the assertion of sovereign powers of the highest magnitude, firmly established the principle that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button*, 371 U.S. 415, 438; see also *United States v. Robel, supra; Lamont v. Postmaster General supra; Aptheker v. Secretary of State, supra* at 508.

The absence of an asserted interest, compelling or otherwise, as justification for excluding Dr. Mandel, makes this case precisely like *Lamont v. Postmaster General, supra.* In both cases, Government officials exercised their conceded powers to censor and withhold information derived from foreign sources, which American citizens have a right to receive. In neither case is there evident a Government interest other than to prevent or

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exclusion power is vested in the national government and in no manner shared with the States or subject to control by any foreign government. See *The Chinese Exclusion Case*, 130 U.S. 581, 604-605.

In *The Chinese Exclusion Case, supra*, this Court specifically ranked the exclusion power among other high powers of government, including the war power, all of which, it noted, were subject in their exercise to constitutional restrictions.

> "The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself. . ." 130 U.S. at 604.

It was made equally clear that judicial review was available to determine whether the exercise of the exclusion or expulsion power bore at least a reasonable relation to the achievement of some legitimate public purpose. See 130 U.S. at 610-611.

This Court has never adopted or given any credence to the Government's position advanced in this case. Contrary to the appellants' view, this Court has never accepted a bare assertion of power as sufficient justification for its exercise. See *infra*, p. 15; cf. *Gegiow v. Uhl*, 239 U.S. 3, 9. That this has been true in cases involving the interests of aliens only, removes any doubt that the court below correctly exercised its jurisdition to redress the deprivation of fundamental rights of citizens.

impede the communication of disfavored political doctrine. As the court below stated:

> "The power to exclude aliens is not questioned: there is not here any distinct aim of the exercise of that power that is primary and to the attainment of which the restraint of First Amendment interests is sacrificed in a secondary or mediating exercise of power. Here the substance of the exercise of the power is the restraint on interests protected by the First Amendment." (13a-14a).[20]

Significantly, the Government in *Lamont* did not claim, as it has here, total exemption from judicial review with respect to the exercise of its powers over foreign commerce, the mails, foreign relations and national security.

If anything, the burden imposed on First Amendment rights in this case is far greater than in *Lamont*. In *Lamont*, the statute required the Postmaster General to forward the detained mail to an addressee immediately upon request. Under the statutory scheme in this case the appellants claim absolute discretion, not merely to delay, but to bar completely Dr. Mandel's admission. Nor does this case involve indiscriminate mailings, as in *Lamont*. Cf. *Rowan v. Post Office Dept.* 397 U.S. 728. Dr. Mandel has been specifically invited to speak by members of the American academic community and his audience will be composed exclusively of those who choose to hear him.

That the federal courts will not abdicate their role in enforcing the freedom of citizens to receive information and engage in academic inquiry, even when confronted by a claim of "sovereign prerogative" was also made unmistakably clear in this Court's most recent decision, *New York Times Co. v. United States*, ___ U.S. ___, 39 U.S. LW. 4879. In that case the

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20. See also *United States v. Hiett*, 415 F.2d 664 (5th Cir. 1970), *cert. denied* 397 U.S. 936; *Williams v. Blount*, 314 F. Supp. 1356 (D.D.C. 1970).

Government sought an injunction against publication by several newspapers of certain "Top Secret" classified documents. It asserted, as it does here, a "sovereign prerogative" over the conduct of foreign affairs and maintenance of national security. But unlike here, the Government in the *New York Times* case did not rest on a bare claim of absolute power. Quite the contrary, the Government fully recognized that even the strong inference of compelling interest that might arise from a "Top Secret" classification must be buttressed by an evidentiary showing that release of the documents would so directly, immediately and irreparable damage national interests that prior censorship of the papers was warranted. The Government attempted, but failed, to meet its burden in the *New York Times case*. It has not even made any attempt to do so here.

If in the ostensibly sensitive area of "Top Secret" documents affecting national security and foreign relations the First Amendment limits governmental actions, then its application is an *a fortiori* matter in this case, where no security interest is apparent and none is asserted. Indeed, in the *New York Times* case, every Justice of this Court wrote an opinion or concurred in one that would reject appellants' contention (Juris. State. p. 9) that "the decision to exclude and the grounds for admissibility are not matters for judicial inquiry." Plainly, as Mr. Justice Harlan said, "[c]onstitutional considerations forbid 'a complete abandonment of judicial control.' Cf. *United States v. Reynolds*, 345 U.S. 1, 8 (1953)." 39 U.S. LW. at 4892-93. Even if Congress had enacted a law authorizing the Government to restrain the publication of secret information which would endanger national security or the effectuation of foreign policies, as Mr. Justice Stewart said, "the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved." 39 U.S.L.W. at 4884.

Again, the principle was stated without qualification in *United States v. Robel*, 389 U.S. 258, 264 that "[w]hen Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is

our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." Mr. Justice White in dissent expressed no difference of opinion with the majority on this point, although upon review he would have sustained the statute involved.

Robel presented a far more difficult test of the principle than does this case. The statute in *Robel* focused solely on membership in the Communist Party by employees of defense plants. The Government made the argument that Congress could punish such membership as an exercise of its war power in order to protect defense plants against sabotage. But this Court held that regardless of the power on which the statute is predicated, it still must meet the precision requirements of the First Amendment, and that measured against those requirements the statute was overbroad. "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'" 389 U.S. at 263-264. See also *Schneider v. Smith*, 390 U.S. 17.

None of the elements which made *Robel* a difficult case are present here; Mandel is not a member of or affiliated with the Communist Party, his political beliefs and expressions are concededly lawful, his visit to this country of course does not involve the obviously sensitive area of defense plants or the possibility of sabotage, or indeed, any unlawful activity and the powers asserted here do not match the extraordinary dimensions of the war power. All that we have here is the "talismanic incantation" and a claim, not even made in *Robel*, that appellants' exercise of power is absolute and beyond judicial inquiry.

Similarly in *Kent v. Dulles*, 357 U.S. 116 and *Aptheker v. Secretary of State*, 378 U.S. 500 the Government unsuccessfully sought to defend the denial of passports to members of the Communist Party on the basis of the twin powers asserted here. But in both *Kent* and *Aptheker*, in striking contrast to this case, the government did not claim that the exercise of these powers was unreviewable. In fact, the Government conceded in

Kent, that the contention that issuance or denial of passports was "a purely political matter" had been correctly rejected in *Shachtman v. Dulles* 225 F.2d 938 (D.C. Cir. 1955).[21] See also *Zemel v. Rusk*, 381 U.S. 1.

It is absurd for appellants to argue that by enforcing the First Amendment right of citizens to hear Dr. Mandel, in circumstances where no specific reason for his exclusion appears other than censorship of what he has to say, the decision below "transfers the power to decide what aliens may come into the United States to any citizen or group of citizens who might claim that they would like to confront the alien in person." (Juris. State. p. 9). The court below asserted jurisdiction only to the limited degree necessary for the determination of the First Amendment issue. It did not examine the wisdom or sagacity of the political judgment made by Congress and appellants that alien exclusion may be an appropriate tool for such purposes as reprisals against foreign governments or for protecting national security by keeping out aliens about whom there is secret or insufficient information with respect to the possibility of their engaging in unlawful activity after entry. Since no such purpose was asserted as a basis for excluding Dr. Mandel, the court below did not even reach the issue of "less drastic" means involved in *Robel*, 389 U.S. at 286.

Appellants rely on *Boutilier v. INS*, 387 U.S. 118, 123 and other decisions which sustain Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." None of these decisions, including *Knauff v. Shaughnessy*, 338 U.S. 537 and *Turner v. Williams*, 194 U.S. 279, upon which appellants chiefly rely, involves a suit by American citizens to enforce their First Amendment right to engage in academic discussions with the alien in this country. None of these decisions discusses or even raises that issue. These cases involved aliens who sought to enter or remain in the country perma-

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21. Brief for the Government in *Kent v. Dulles*, p. 26.

nently, not merely for a temporary period and solely for the purpose of fulfilling invitations to speak. In each case the rights asserted were exclusively those of the alien, who generally has none. See *Knauff v. Shaughnessy, supra; Turner v. Williams, supra.*

Knauff, moreover, was a plurality opinion with strong dissents registered by Justices Jackson, Black and Frankfurter. *Turner* actually applied the First Amendment test then applicable to speech by citizens. And in *Harisiades v. Shaughnessy,* 342 U.S. 580 the Court applied the standard of *Dennis v. United States,* 341 U.S. 494, 509-515 to determine the deportability of a member of the Communist Party. See also *Bridges v. Wixon, supra.* Significantly, in *Harisiades,* as the court below noted, this Court "did not rely upon *Turner* (which was cited to it) nor invoke the argument (made to it) that the power to expel aliens is an attribute of sovereignty essentially relating to foreign affairs and national safety and, therefore, not restricted impliedly by provisions of the Constitution which do not expressly relate to it." (15a)

These cases and another, *Zemel v. Rusk, supra,* upon which the appellants rest their position not only do not support it, but in fact serve to underscore its fatal deficiency. In each of those cases, unlike this one, the Government asserted, and the Court found, that the particular actions complained of furthered a specific legitimate and substantial, if not compelling, interest of the United States.

In the *Chinese Exclusion Cases, supra* (Chinese laborers); *Nishimura Ekiu v. United States,* 142 U.S. 651 (paupers); and *Boutilier v. INS., supra* (homosexuals), the Court sustained the exclusion of the aliens involved, based on evidentiary records in which the Government had established that admission endangered the economic, medical or social welfare in the country. In *Turner* the Court concluded that a permanent resident alien should be deported where the Government's evidence established that the alien "contemplated the ultimate realization of his ideal [elimination of government] by use of force or that his speeches were incitements to that end." 194

U.S. at 264 and 269 (Mr. Justice Brewer concurring). The same conclusion was reached in *Harisiades* after the Court applied the *Dennis* standard to the evidentiary record made by the government. *Galvan* sustained the deportation of a knowing member of the Communist Party based on evidence submitted by the Government and on Congressional findings concerning the inherent danger posed by such membership. Cf. *Barenblatt v. United States*, 360 U.S. 109, 127-128.

Knauff upheld as "reasonable" the exclusion of an alien based on a statute which was effective only in time of war or national emergency, and on an assertion by the Attorney General, not made here, that the alien's admission would be prejudicial to the interests of the United States on the basis of confidential information, the disclosure of which would endanger national security.

We stress that in each of these cases the Court required a showing that the deportation or exclusion related in fact to a legitimate government interest, although none of the cases involved the assertion of First Amendment rights by citizens. Therefore, if the broader language of the Court in *Galvan* and *Turner* would sustain deportation of a resident alien based on membership in the Communist Party or a philosophical belief in anarchism, it must be discounted by the fact that the Government interest asserted was never tested against the rights of anyone but aliens.

The situation in *Zemel*, contrary to appellants' view, thoroughly undermines their position. *Zemel* sustained Department of State regulations generally banning validation of passports for Cuba. The Court acknowledged that the refusal to validate passports inhibited travel to Cuba but held that in light of the compelling necessity demonstrated by the Government, the resulting interference with the right to gather information about Cuba was not unconstitutional. As the Court stated, "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." 381 U.S. at 17. But, that the right to gather or receive information may be restrained, like any other exercise of First Amendment right, does

not mean that it may be restrained without justification, and certainly not for the purpose of preventing citizens from gathering or receiving the information they seek.

Zemel patently does not support appellants' claim of absolute and unreviewable power "to refuse or to grant visas to certain aliens, including Mandel and those similarly situated." (Juris. State., p. 10). In fact the Court pointedly rejected any assumption "that simply because a statute deals with foreign relations, it can grant the executive totally unrestricted freedom of choice." 381 U.S. at 17. Quite unlike this case and in striking contradiction to appellants' contentions, *Zemel* was expressly predicated on an overwhelming showing by the Government that the refusal to validate passports to Cuba was substantially related to furthering specific foreign and domestic interests of the United States.[22] In marked contrast to this case, where no such interest is claimed to be served, *Zemel* was based on what the Court termed the "weightiest considerations of national security" including the existence of extreme hostility between this nation and Cuba, the fact that restrictions on passport validations were instituted in the direct aftermath of the Cuban missile confrontation and the severance of diplomatic relations with Cuba, and the determination by our Government and other members of the Organization of American States that travel restrictions were necessary to combat alleged subversion of Western Hemisphere countries.[23]

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22. It was precisely on this basis, which distinguishes the instant case from *Zemel*, that the Government sought to differentiate the circumstances of *Zemel* from those of *Kent v. Dulles*, *supra*. Thus the Government characterized the passport regulation involved in *Kent*, as having only a "remote relationship to foreign policy for it was aimed, not at intercourse with a particular country because of the state of international relations, but at a small class of American citizens regardless of international conditions or the country to which they wish to travel." Brief for the Government in *Zemel v. Rusk*, p. 22. By contrast the regulations in *Zemel*, as the Government pointed out, was narrowly and directly related to the Cuban missile and diplomatic crises. *Id.* at p. 35.

23. It should be noted that the policy involved in *Zemel* only inhibited travel but did not impose any criminal or other sanctions. See *United States*

CONCLUSION

The court below was unquestionably correct in enforcing the First Amendment rights of American citizens to meet with Dr. Mandel, an alien scholar, in this country, where appellants have advanced no legitimate government interest that is served by preventing such meetings. The motion to affirm should be granted.

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v. Laub, 385 U.S. 475. Here the ban on Dr. Mandel's admission, is in every practical sense, absolute.

Moreover, Zemel sought validation of his passport for travel to Cuba "to satisfy [his] curiosity . . . and to make [him] a better informed citizen." 381 U.S. at 4. When measured against the national security and foreign policy considerations advanced by the Government, the extremely personal privilege of one citizen appears an insufficient basis for the relief he requested. Here, again by contrast, no specific Government interests are involved, and the appellees assert the rights of university and large general audiences, which guarantee to serve the public interest in intensive analysis and wide dissemination of the information gleaned from Dr. Mandel's appearances. See *Teague v. Regional Commissioner*, *supra* at 446 n. 6.